No. 00-1851

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

E. JOSEPH FACE, JR., COMMISSIONER OF FINANCIAL INSTITUTIONS, BUREAU OF FINANCIAL INSTITUTIONS, VIRGINIA STATE CORPORATION COMMISSION, ET AL.,
Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

A.

With regard to Respondent's Counterstatement of the Question Presented (Opp. Brief, at p. i), whether or not certiorari should be granted is certainly a decision to be made by the Court, but is not a "question presented" within the meaning of Rule 14.

B.

With regard to the third paragraph of Part I of Respondent's Counterstatement of the Case (Opp. Brief, at pp. 2, 3), Petitioners observe that the "Parity Act", as enacted, made no mention of the Office of Thrift Supervision ("OTS") or its Director because, of course, neither the OTS nor its Director existed in 1982. The OTS never "issued", in any sense of that word, any regulation under the Parity Act until, possibly, 1996.

With regard to the fifth paragraph (Opp. Brief, at pp. 3, 4), the language used conveys the false impression that Virginia's statutory limits on prepayment penalties chargeable on home mortgage loans originated in 1987, or were somehow related to or influenced by the 1982 Parity Act. In fact, the restrictions contained in §§ 6.1-330.83 and 6.1-330.85 of the Code of Virginia originated in 1946 with enactment of Chapter 386 of Virginia Acts of Assembly of that year. A one percent prepayment penalty restriction was then imposed under § 4168-b(23) of the Code of Virginia.

With regard to assertions in Part III of Respondent's Counterstatement of the Case, and elsewhere in its Brief In Opposition, that arguments founded upon (1) legislative prerogatives reserved to the states under the Tenth Amendment, and (2) the specific preservation of state laws relating to prepayment penalties in connection with

enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA") were not made in the courts below and are therefore waived, Petitioners state that the record below belies these assertions. For example, we quote Petitioner's opening brief in the court below – "Moreover, although the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7, preempted many state laws affecting first mortgage loans, Congress chose not to preempt laws governing prepayment penalties, a field left historically to State control."

C.

Petitioners do not assert, as claimed by Respondents (Opp. Brief, pp. 9, 12-15), that the Parity Act itself "violates the Tenth Amendment." Contrariwise, Petitioners assert that a 1996 action by the OTS, as interpreted by it and the courts below, invaded an area preserved by prior Congressional enactment (DIDA) and the provision of a three-year opt-out period under the Parity Act. Nor do Petitioners challenge Congress' power to preempt state law under the Commerce Clause; rather, Petitioners assert that Congress' intended preemptive reach under the Parity Act was less broad than Respondent claims. To this proposition, Respondent makes no rejoinder.

With regard to the argument in part 2 of the Reasons for Denying the Writ (Opp. Brief, pp. 16, 17), in addition to denying any procedural default, Petitioners note that in order for statutes to be deemed in pari materia, it is not necessary that they be legally identical or functionally equivalent. They need only touch upon the same subject matter (see authorities cited in the Petition for Certiorari, at p. 12). Second, it does not follow from the fact that a particular home mortgage loan is a "federally related mortgage loan," as defined under 12 U.S.C. § 1735f-5(b), that every facet and

feature of it is governed by federal rather than state law. Thirdly, § 501(c)(1) of DIDA is not now 12 U.S.C. § 1735f-7a but 12 U.S.C. § 1735f-7a(c)(1). The latter pertains to the sale and financing of mobile homes, a subject that is not at issue in this case.

With regard to part 3 of Respondent's Reasons for Denying the Writ, Petitioners note that the language "... housing creditors for single family dwellings for more than four families" (Opp. Brief, p. 18) is anomalous. Respondents also invoke the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (Opp. Brief, p. 21) for the first time in this case. Respondent's failure to refer to this law or make any argument founded upon it in the courts below operates to prevent consideration of it in this Court under the same authorities cited in its brief (Opp. Brief, pp. 12, 13, 16).

The remainder of part 3 consists of argument founded upon a literalistic reading of the language "notwithstanding any State constitution, law or regulation" used by Congress in the Parity Act to express its preemptive intent, 12 U.S.C. § 3803(c), which Respondent repeats like a mantra. Respondents would have the Court construe this language to preempt all state laws, perhaps even those laws having nothing to do with money lending. Such a position is clearly untenable. Congress explicitly preserved state home mortgage lender licensing laws in the Parity Act itself at 12 U.S.C. § 3802, requiring that non-federal housing creditors abide by such state laws as a condition to availing themselves of the Parity Act's benefits. Under Respondent's theory of the preemptive reach of the Parity Act, state-chartered lenders could lawfully impose a condition in an alternative mortgage transaction agreement that a homeowner's minor child be apprenticed to the lender until attaining his or her majority contrary to state compulsory education laws, provided that the lender otherwise complied

with applicable OTS regulations. Such a result is absurd, but fits Respondent's theory of the law.

CONCLUSION

Respondents ask the Court to view this matter as a "garden variety" federal preemption case. Petitioners believe that the possibly tens or hundreds of thousands of American homeowners held captive under high rate "alternative" home mortgage loan agreements providing for steep prepayment penalties view the issues raised by this case in a different light. To them, to Petitioners, and to the many states having laws restricting prepayment penalties on home mortgage loans, this is a case of imperative public consequence.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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